

DECISION DOCUMENT
NATIONWIDE PERMIT NO.21

10 Dec 1996

This document constitutes the Environmental Assessment, 404(b)(1) Compliance Review and Statement of Findings for the Nationwide Permit (NWP) described below.

1. SURFACE MINING ACTIVITIES. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must include an OSM or state approved mitigation plan. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)) (Sections 10 and 404)

General conditions of the NWP are contained in the Federal Register. Notification requirements, additional conditions, limitations and restrictions are contained in 33 CFR Part 330.

2. STATUTORY AUTHORITY:

- (a) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- (b) Section 404 of the Clean Water Act (33 U.S.C. 1344)

3. COMPLIANCE WITH RELATED LAWS (33 CFR 320.3):

- (a) General:

NWPs are a type of general permit designed to regulate certain activities that have minimal adverse impacts and generally comply with the related laws in 33 CFR 320.3. While an individual review of each activity authorized by a NWP will normally not be performed, potential adverse

impacts and compliance with the laws in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, additional provisions, and the review process that is undertaken prior to the issuance of NWPs.

(b) Terms and Conditions:

Specific general conditions of all NWPs provide for a case-by-case review of activities that may adversely affect endangered species or historic properties. Certain NWPs also have a notification requirement that will trigger a case-by-case review of particular activities. Another condition prohibits use of NWPs for activities that are located in wild and scenic rivers. None of the NWPs authorize artificial reefs.

In some cases, activities authorized by a NWP may require other Federal, state or local authorizations. Examples of such cases include but are not limited to: activities that are in or affect marine sanctuaries or marine mammals; the ownership, construction, location and operation of ocean thermal energy conversion facilities or deepwater ports beyond the territorial seas; or the transfer of a lot in a subdivision that is part of a project that requires a DA permit. In such cases, a provision of the NWPs specifies that the NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)]

To further ensure that effects will be minimal, whenever, this NWP is combined with any NWP 12 through 40 a Corps-only PCN is required. The Corps will review such combinations of NWPs to ensure that the individual or cumulative effects are minimal. The Corps believes that combinations of any NWP 1 through 11 which does not already require a PCN, will result in minimal individual and cumulative effects. Therefore, no PCN would be necessary for the stacking of such NWPs.

An additional safeguard is a provision that allows the Chief of Engineers, division engineers and/or district engineers to: assert discretionary authority and require an individual permit for a specific action; modify NWPs for specific activities by requiring special conditions on a case-by-case basis; add special conditions on a regional basis for certain NWPs; or take action to suspend or revoke a NWP. [33 CFR 330.4(e) and 330.5]

(c) Review Process:

The analysis contained in this document and coordination that was undertaken prior to the issuance of all NWP's fulfills the requirements of the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act and other acts promulgated to protect the quality of the environment.

All NWP's that authorize activities which may result in a discharge into waters of the U.S. require a 401 water quality certification. NWP's that authorize an activity within, or affecting land or water uses within a state that has a Federally approved coastal zone management program must also be certified as being consistent with the state's program. The procedures for compliance of NWP's with these laws are contained in 33 CFR 330.4(c) and (d), respectively.

(d) Public Comment and Response:

For public comment and response see the preamble to the Federal Register notice issuing the Final NWP's.

4. INDIVIDUAL AND CUMULATIVE IMPACTS:

(a) General evaluation criteria:

This evaluation constitutes the public interest review specified in 33 CFR 320.4 (a)(1) and (2), including environmental considerations of NEPA and the impact analysis specified in Subparts C-F of the 404(b)(1) Guidelines (40 CFR 230).

The evaluation criteria that are relevant to this particular NWP are identified in the following matrixes.

The determination that a particular factor is relevant or not is based upon consideration of the direct and indirect impacts that can be reasonably attributed to the authorized activity.

Because NWP's authorize activities on a nationwide basis, it is difficult to predict all of the indirect impacts that may be associated with each individual action. For example, the NWP for a road crossing may be used to fulfill a variety of project purposes. Indication that a factor is

not relevant to a particular NWP does not necessarily mean that the NWP would not have an effect on such factor(s), but that it is a factor not readily identified with the authorized activity. In any case, adverse impacts will be controlled by the terms, conditions and additional provisions of the NWP. For example, Section 7 consultation will be required for activities that may adversely impact endangered species. In other cases, factors may be relevant, but have negligible impacts. For example, the impacts of a boat ramp on flood plain values, water level fluctuations or flood hazards.

Factors identified as being relevant, to the extent that potential impacts of the activity determined the terms and conditions of a NWP, are discussed at the end of the matrixes.

(b) NEPA Alternatives:

This evaluation includes an analysis of alternatives based upon NEPA requirements which require a more expansive review than the section 404(b)(1) Guidelines. The alternatives discussed below are based upon an analysis that indicates the potential environmental impacts as well as impacts to the Corps, public, Federal and State resource agencies, and permit applicants. Furthermore, the OSM is the lead Federal agency responsible for completing the appropriate NEPA document to address the specific environmental impacts of surface coal mining activities.

(i) No Action Alternative (no nationwide permit):

The no action alternative would not achieve the goals of the Corps nationwide permit program to reduce the regulatory burden on applicants for activities that would result in no more than minimal adverse environmental impacts. The no action alternative would take resources away from the Corps ability to pursue the current level of review for other activities with more environmental impacts. This includes individual permits that result from the Corps taking its discretionary authority under the nationwide permit program. In the absence of this nationwide permit, Department of the Army authorization in the form of another general permit (regional or programmatic general permit (where appropriate)) or individual permits would be required. Corps district

offices would most likely attempt to develop a regional general permit in lieu of a nationwide permit but this is an inefficient method and not practicable for the development of a general permit for activities that have applicability across the Nation. Not all districts would develop the regional general permit for a variety of reasons. This would result in an inconsistent establishment of regional general permits and create situations where similar activities with minimal impacts would be evaluated differently, potentially within the same state. In addition, the resources necessary for the Corps to evaluate activities through an individual permit review, and the resources necessary for the public and Federal and State resource agencies to review and comment, would be overly burdensome for the numerous public notices that would result from not issuing this nationwide permit along with the other NWPs. As an example, when the Corps publishes a public notice for proposed activities that result in no more than minimal adverse environmental impacts, the Corps typically does not receive responses to our public notices from either the interested public or Federal and State resource agencies. One other highly beneficial aspect of the nationwide permit program that would not be achieved through the no action alternative has been the desire of applicants to design activities that will meet the terms and conditions of a nationwide permit.

We believe the NWPs have reduced environmental impacts significantly because most applicants modify their project to use the NWPs in an effort to avoid the delays and costs typically associated with the evaluation of an individual permit application.

(ii) National Modification Alternatives:

Since the Corps nationwide permit program began in 1977, we have continuously strived to develop nationwide permits that will cause no more than minimal adverse environmental impacts for use throughout the Nation. We have developed the terms and conditions of this nationwide permit based upon this experience, including comments from the public and Federal and State resource agencies. The Corps is constantly reevaluating the potential impacts of activities covered under nationwide permits and every five years at a minimum reevaluating the nationwide permits as appropriate.

As a result, the Corps has considered both decreases and increases in the scope of work for this nationwide permit

and has determined that other alternatives are not practicable nor reasonable either from an environmental impact standpoint or from the effects associated with evaluating additional individual permits for activities.

(iii) Regional Modification Alternatives:

Corps divisions and districts will monitor and analyze the impacts of the nationwide permits and if warranted, regionally condition this nationwide permit to ensure that no more than minimal adverse environmental impacts result.

In some cases districts will revoke the use of the nationwide permit based upon the potential for unacceptable adverse environmental impacts (e.g., high value or unique wetlands) to occur even though the terms and conditions of the permit may be met.

(iv) Case specific on-site alternatives:

While thresholds have been developed for each nationwide permit, on-site alternatives will be considered for activities requiring a PCN further ensuring that this nationwide permit will result in no more than minimal adverse environmental impacts. The PCN evaluation by the Corps may find that further conditioning of the nationwide permit for a specific activity, including relocating or further reduction of the impacts of the activity and/or compensatory mitigation, is necessary or that the project should be evaluated under the Corps individual permitting procedures. Specifically, if the Corps district determines that a proposed activity will have more than minimal adverse environmental impacts on a high value aquatic resource, they may require an individual permit. This would result in a project specific alternatives analysis, including off-site alternatives, where high value aquatic resources are involved.

(c) Public interest review (320.4(a)(1)):

<u>FACTOR:</u>	<u>RELEVANT TO THIS ACTION:</u>	
	<u>YES</u>	<u>NO</u>
<u>Conservation</u>		X
<u>Economics</u>	X	
<u>Aesthetics</u>	X	

General environmental concerns	X	
Wetlands	X	
Historic properties	X	
Fish and wildlife values	X	
Flood hazards	X	
Flood plain values	X	
Land use	X	
Navigation	X	
Shore erosion and accretion	X	
Recreation	X	
Water supply and conservation	X	
Water quality	X	
Energy needs	X	
Safety	X	
Food and fiber production		X
Mineral needs	X	
Considerations of property ownership	X	

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(d) Impact analysis (Subparts C-F):

<u>FACTOR:</u>	<u>RELEVANT TO THIS ACTION:</u>	
	<u>YES</u>	<u>NO</u>
Substrate	X	
Suspended particulates/turbidity	X	
Water	X	

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Current patterns/water circulation	X
Normal water level fluctuations	X
Salinity gradients	X
Threatened and endangered species	X
Aquatic food web	X
Wildlife	X
Special aquatic sites	X
Municipal and private water supplies	X
Water related recreation	X
Aesthetics	X
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas	X

(e) Potential impacts:

(i) General:

As specified by the description of the NWP, activities associated with surface coal mining activities are permitted provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977. The notification procedure will allow the district engineer to ensure that adverse environmental impacts of the proposed activity are minimal and that impacts to wetlands and other special aquatic sites are adequately mitigated. Allowing conditions to be placed upon proposed activities on a case-by-case basis will help to ensure that the proposal is environmentally sound.

Road crossings and other activities may be authorized by multiple use of NWPs or regional permits issued by division

or district engineers. The related work must meet the terms and conditions of the specified permit(s). If use of the NWP is dependent on portions of a larger project that requires an individual permit, the NWP will not apply. [See 33 CFR 330.6 (c) and (d)]

(ii) Physical, chemical and biological characteristics of the aquatic ecosystem:

Surface mining operations may result in the destruction of riparian vegetation. Some vegetation may have to be removed prior to mining while other vegetation may be crushed as a result of various mining and construction activities or smothered by the placement of fill material.

Overhanging riparian vegetation provides shelter, shade, breeding and rearing areas for various fish and other aquatic organisms as well as terrestrial wildlife such as birds and small mammals. Emergent vegetation also provides habitat and food for a wide variety of terrestrial and aquatic organisms. Because impacts to wetlands and other special aquatic sites will be mitigated, the adverse impacts of removing or covering the riparian vegetation are expected to be minimal.

During the associated mining activities fish and other motile aquatic organisms are most likely to avoid the area.

Benthic, immotile or slow moving organisms in the path of equipment and building materials will be destroyed. Some organisms will be smothered by the placement of fill material or when suspended material settles to the bottom.

Benthic organisms may recolonize some portions of the site after construction is complete and vegetation should return to disturbed areas over time.

Depending on the construction method used with appropriate sedimentation and erosion controls, composition of the bottom, and wind and current conditions during construction, fill material placed in the water and suspended in the water column will temporarily increase the turbidity of the water. Material would once again be suspended in the water column upon removal of the structure or fill. The plume generated will normally be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the construction activity.

During the mining activity small amounts of oil and grease may be discharged into the watercourse from construction equipment. Because the mining activity must be authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977, the frequency and concentration of these discharges are not expected to have more than minimal adverse impacts on overall water quality.

The NWP contains general conditions that will trigger special procedures for activities that may adversely affect historic properties or endangered species.

(iii) Effects on human use characteristics:

Surface mining activities may alter the visual character of some waterways. The extent and perception of the alteration will vary depending upon the nature of the surrounding area and the values of the public using or viewing the waterway. However, the requirement to mitigate impacts to wetlands and other special aquatic sites will minimize this impact over time.

The issuance of a NWP for surface mining activities may have a positive impact on the local economy. It could generate jobs and revenue for the local. The use of the NWP would be associated with the production or shipping of petroleum and/or mineral products. The NWP will also provide the public with a form of authorization that can be obtained with little delay and paperwork.

Surface mining activities in some locations could compete with recreational uses of a waterbody.

(iv) Cumulative Impacts:

Cumulative impacts of the NWP generally do not depend on the number of times the permit is used on a national basis but on the number of times this NWP and other permits are used within a geographic area. Within a geographic area (e.g., a specific watershed) it may be determined that the cumulative effects of NWPs have more than minimal adverse impacts. The division engineer and the district engineer will monitor and review geographic areas that may have cumulative impacts that are more than minimal. The

division engineer and the district engineer have the authority to require individual review of projects or to require special conditions to the permit either on a case-by-case basis or on a regional basis where cumulative impacts are determined to be more than minimal. When a division engineer or district engineer determines that a geographic area may have cumulative impacts that are more than minimal they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision they will compile information on the cumulative adverse impacts and supplement this document.

Based upon a survey of division and district offices, we estimate approximately 10900 acres of impacts nationally from all NWP's with approximately 7800 acres of wetland mitigation. We expect that this NWP may be used to authorize approximately 40 surface coal mining activities per year on a national basis. Of those approximately 20 surface coal mining activities will have wetland impacts of approximately 130 acres with the Corps requiring approximately 180 acres of compensatory wetland mitigation.

The demand for these types of activities could increase or decrease over the five year duration of this NWP. Using the current trend approximately 200 surface coal mining activities could be authorized over a five year period with wetland impacts of approximately 650 acres and compensatory wetland mitigation of approximately 900 acres for those wetland impacts. We expect that the time savings associated with the use of this NWP will encourage applicants to design their project within the scope of the permit rather than request an individual permit which could have a greater adverse impact.

(f) Additional Public Interest Review Factors 33 CFR 320.4(a)(2):

(i) Relative extent of the public and private need for the proposed structure or work 33 CFR 320.4(a)(2):

The need for the NWP is based upon the large number of permit applications for surface mining activities. It can also be used in conjunction with several other proposed NWP's for minor activities.

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations

and methods to accomplish the objective of the proposed structure or work:

The objective of the proposed action is to develop a permit, that is readily obtained by the public and authorize an activity that has minimal adverse impacts on the aquatic environment and overall public interest.

Most situations in which there is an unresolved conflict as to resource use, arise when environmentally sensitive areas are involved (e.g. special aquatic sites, including wetlands) or there are competing uses of a resource (e.g. use of a waterway for commercial versus recreational purposes). The nature and scope of the proposed action as well as the terms and conditions of the NWP minimize the likelihood of such a conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see sections 1 and 3 of this document).

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited:

The nature and scope of the work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the activity.

As previously stated, the terms, conditions and provisions of the NWP were developed to ensure that individual and cumulative adverse impacts are minimal. Specifically, NWPs do not obviate the need for the general permittee to obtain other Federal, state or local authorizations required by law. Conditions of the NWPs also specify that it does not grant any property rights or exclusive privileges (see section 3 of this document and 33 CFR 330.4 for further information). Additional conditions, limitations, restrictions and provisions for discretionary authority as well as the ability to include activity specific or regional conditions on this NWP provide further safeguards to the aquatic environment and overall public interest. Provisions are also included to allow suspension, modification or revocation of the NWP. Refer to sections 1 and 3 of this document for further information and

procedures.

(g) Endangered Species:

Compliance with Section 7 of the ESA under this NWP is the responsibility of the OSM, since they are the lead Federal agency for reviewing the impacts of surface coal mining activities. The following is a discussion of the Corps procedures to ensure our compliance with Section 7 for the purposes of this NWP.

The Corps believes that the procedures that we have in place ensure proper coordination under Section 7 of the ESA as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal coordination with the Fish and Wildlife Service and the National Marine Fisheries Service.

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by the action. Based upon this consideration and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the activity regulated may affect or the district determines that the action is not likely to adversely affect any endangered species. Consultation may occur under the NWP process or the district may take its discretionary authority to require an individual permit for the action and initiate consultation through the individual permit process. If the consultation is conducted under the NWP process without the district asserting its discretionary authority, then the applicant will be notified that he can not proceed until the consultation is complete. If the district determines that the activity would have no affect on any endangered species, then the district would proceed to issue the NWP authorization.

Corps districts have in most cases established informal or

formal procedures with its local counterparts in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse affects on ESA species. In many cases maps are available on the local level that identify locations of populations of endangered species and their critical habitat. Moreover, this NWP involves a level of potential impacts that require a PCN process of coordination with the other agencies, the Corps is now specifically requesting any information that the FWS or NMFS may have on endangered species as part of the PCN consultation. Thus, based on the location of the project an additional level of review now exists for these types of projects. Any information provided through the PCN process will be used by the district to make its may affect, not likely to adversely affect or no affect decision.

In addition to the procedures listed above, each NWP verification includes general condition 11 which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a critical habitat".

Also, to avoid possible confusion on the part of some applicants Condition 11 has been modified to clarify that this NWP does not authorize the taking of threatened or endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of threatened or endangered species.

Based on the above the Corps has determined that this NWP will have no affect on threatened or endangered species or their critical habitat.

Although the Corps continues to believe that these existing procedures ensure that the ESA is complied with, we will take the following additional steps to provide further assurance. First, although not required to, the Corps will request programmatic formal Section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no affect. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and reissued NWPs. Second, the Corps will direct the district offices, in

writing, to meet with appropriate local representatives of the FWS and NMFS and establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether a specific activity may affect an endangered species and thus whether or not to initiate consultation.

The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of higher likelihood that a permitted activity may affect an endangered species.

5. EVALUATION OF COMPLIANCE WITH THE GUIDELINES PROMULGATED UNDER SECTION 404(b)(1) OF THE CLEAN WATER ACT (40 CFR 230):

The 404(b)(1) compliance criteria for general permits is contained in 40 CFR 230.7.

(a) Evaluation Process 230.7(b)(1):

(i) Alternatives 230.10(a):

The consideration of alternatives are not directly applicable to general permits.

(ii) Prohibitions 230.10(b):

This NWP involves various activities, some of which may result in a discharge and require 401 water quality certification. State water quality certification requirements will be met in accordance with the procedures contained in 33 CFR 330.4(c).

No toxic discharges will be authorized by this NWP. Section 404 general condition no. 3 specifically states that the material discharged must be free from toxic pollutants in toxic amounts.

No adverse impact on endangered species will be authorized by this NWP. Refer to general condition no. 11 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize the violation of any requirement to protect any marine sanctuary. Refer to

section 3 of this document for further information.

(iii) Findings of Significant Degradation 230.10(c):

Potential impact analysis (Subparts C-F):

The potential impact analysis specified in Subparts C-F is contained in section 4 of this document.

Evaluation and testing (Subpart G):

Because the terms and conditions of the NWP specify the type of discharges that are authorized as well as those that are prohibited, individual evaluation and testing for the presence of contaminants will normally not be required.

If a situation warrants, provisions of the permit allow division or district engineers to further specify authorized/prohibited discharges and/or require testing.

Based upon Subparts B and G, after consideration of Subparts C-F the discharges authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

(iv) Factual determinations 230.11:

The factual determinations required in 230.11 are contained in section 4 of this document.

(v) Appropriate and practicable steps to minimize potential adverse impacts 230.10 (d):

As demonstrated by the information contained in this document as well as the terms, conditions and provisions of this NWP, actions to minimize adverse effects (Subpart H) have been thoroughly considered and incorporated into the authorization.

(b) Evaluation process 230.7(b)(2):

(i) Description of the permitted activities:

As indicated by the description of the NWP in section 1 of this document and the discussion of potential impacts in section 4, the activities to be regulated by this NWP are sufficiently similar in nature and environmental impact to

warrant regulation under a single general permit. Specifically, the purpose of the activity is to authorize surface mining activities in waters of the United States.

The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

If a situation arises in which the activity requires further review or is more appropriately regulated under an individual permit, provisions of the NWP allow division and/or district engineers to take such action.

(c) Cumulative effects 230.7(b)(3):

A discussion of cumulative effects, including the number of activities likely to be regulated under this NWP is contained in section 4 of this document.

6. Final Determinations:

(a) Need for an environmental impact statement (FONSI):

Based upon the information contained in this document, issuance of the NWP will not have a significant impact on the quality of the human environment and the preparation of an Environmental Impact Statement is not required.

(b) 404 (b)(1) Compliance:

On the basis of the 404(b)(1) Guidelines (Subparts C-G), the discharges authorized by this NWP comply with the requirements of the Guidelines with the inclusion of appropriate and practicable conditions to minimize pollution or adverse effects on the affected aquatic ecosystems.

(c) Public interest:

Based upon the information presented in this document, issuance of the NWP, as prescribed by the regulations contained in 33 CFR Parts 320 to 330, and 40 CFR 230, is not contrary to the public interest.

(d) Section 176(c) of the Clean Air Act General Conformity Rule

Review:

The proposed NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps.

For these reasons a conformity determination is not required for this NWP.

FOR THE COMMANDER:

/signed/
Russell L. Fuhrman
Major General, U.S. Army
Director of Civil Works